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Supreme Court of the United States

OCTOBER TERM, 1938

No. [redacted] 44

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,

Petitioner,

against

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1938

No. 943

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,

Petitioner,

against

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinions below are printed in Appendix C of the petition and are correctly cited. The opinion of the New York Court of Appeals (R. 302*) is reported in 279 N. Y. 192; the opinion of the Appellate Division (R. 294) is reported in 254 App. Div. 237.

* References are to pages of the record printed for this Court.

Jurisdiction

The jurisdiction of this Court is invoked under section 237, as amended, of the Judicial Code (28 U. S. C., § 344, subd. b), upon the ground that the New York City Sales Tax Law, as applied to the transactions here involved, violates the Commerce Clause (Art. I, Sec. 8, Clause 3) of the Constitution of the United States. Pertinent excerpts from the applicable statutes will be found in Appendices A and B hereof.

Statement of the Case

The respondent, Compagnie Generale Transatlantique (more familiarly known as the "French Line"), is a French corporation engaged in the transportation of passengers and freight by sea between the United States and foreign countries, with its headquarters in Paris. The business is carried on in the respondent's ships sailing under the French flag and registered in French home ports. All the ships were employed throughout the tax period in foreign commerce (R. 25, 64, 74).

The ships operate on fast schedules which necessitate a quick turn-around in the Port of New York. Refueling takes place during this short time at respondent's pier in the City of New York. Oil is purchased for this purpose by respondent from the Standard Oil Company of New Jersey, is transported by barge from the latter company's storage tanks *in New Jersey* and pumped directly from the barges into the ship's bunkers (R. 106, 51, 120-121).

A tax of 2% was asserted under Local Law No. 20 of 1934 of the City of New York, as amended, during the

period commencing December 10, 1934, and ending December 31, 1935, on the purchase price paid for this oil by respondent (R. 9, 25). The statute is the New York City Sales Tax Law. The tax is imposed "upon the amount of the receipts from every sale in the City of New York" of tangible personal property sold at retail (§ 2).

Both the Court of Appeals and the Appellate Division held that the assessment with respect to the deliveries from New Jersey should be annulled (R. 302, 294). A judgment has been entered ordering refund of the tax (R. 308). In both courts the basis of the decision was that imposition of the tax was in conflict with the Commerce Clause.

The Standard Oil Company of New Jersey transports the oil from Venezuela (with the exception of a few instances in which domestic oil may have been used [R. 106]) and stores it in the State of New Jersey, where it has extensive storage and refining facilities. If refined before importation, it is stored in bond. If imported as crude, it is handled as drawback oil and refund of duties is obtained after consumption by the respondent (R. 188-189). No facilities are maintained by the seller for storage or refining in the City of New York (R. 105, 196-200, 206). Before entering into the contract for the purchase of the oil, respondent examined Standard Oil's docks and plant in New Jersey in order to determine whether its facilities were sufficiently adapted to and capable of meeting respondent's needs (R. 30).

For years respondent has been pursuing the same course of dealings under its contracts, taking delivery in New York of oil from Standard Oil's plants in New Jersey. During

a period of eight years all but five of 971 deliveries to respondent were made from the State of New Jersey and from the Standard Oil plants (R. 28, 30, 223-225).

In the face of these facts, petitioner in his statement of the case (at page 11 of his brief) urges this Court to consider that:

> "Neither the letters nor the agreement contain any provision requiring the oil to come from New Jersey or from anywhere else. No mention is made in them of a shipping point, the oil being sold merely 'delivered' * * *. Respondent is never notified, nor does it ever ascertain, where shipment is to be made from or where it is actually made from * * *. So far as the use of the oil is concerned, the source of supply makes no difference whatever * * *."

The Court of Appeals, however, reached the following conclusions in respect of the transactions (R. 303, 304):

> "These two companies have been doing business for many years, and it was well understood that the oil of the Standard Oil Company of New Jersey was stored in thousands of tanks in Bayonne, New Jersey. So far as this record shows, it had no storage facilities in New York City. * * * The oil was brought from New Jersey by the oil company's barges. * * * the Standard Oil Company of New Jersey maintains a large number of oil tanks in Bayonne, New Jersey, and the vicinity. The steamship company knew that the nature of the business required oil to be stored in large quantities, and that the oil company had such a plant, and delivered its oil by drawing it off from these tanks into ships at Bayonne, or else into barges, to be carried to vessels at the port of New York. While the purchase or the contract of sale was made in New York, it was with a view of get-

ting this specific oil, the product of the Standard Oil Company of New Jersey, from its plant and tanks in New Jersey. *The product in New Jersey, kept there in tanks, was the thing bargained for.* So far as the record in this case goes, the contract centers around the purchase of the New Jersey oil of the kind and quantity specified. The delivery at the Port of New York was made necessary because of the draft of the steamers. * * *

Here, * * * there is a special product of the Standard Oil Company of New Jersey which has to be kept in great receptacles built for the purpose which we can treat by analogy as a manufacturing plant. *It is the articles of this plant in New Jersey which the purchaser seeks.* At the office of the seller in New York it bargains for this oil to be put in its ships. We think, under the principles stated in the *Sears, Roebuck* case and the authorities there cited, *that this is a contract for interstate shipments*" (Italics ours).

Summary of Argument

I.

The petitioner is asking this Court to review a determination of facts and not an interpretation of decisions of this Court.

II.

This Court has refused to grant a petition for certiorari in the *National Cash Register* case, which involved the same constitutional question and a state of facts of much broader application than here involved.

III.

Petitioner has cited no decision of this Court with which the decision of the Court of Appeals is not in accord.

ARGUMENT

I.

The petitioner is asking this Court to review a determination of facts and not an interpretation of decisions of this Court.

Petitioner sets forth two questions which are presented by this case (Petition, p. 5). Question (b) is;

> "Do respondent's purchases of fuel oil 'require or necessarily involve transportation across the state boundary' in the sense in which those words were used in *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169, 174 (1935)?"

The petitioner argued at length in the Court of Appeals that the transactions involved in this case were on all-fours with the transaction in the *Wiloil* case and that that case was controlling of the issues here presented. Both the Appellate Division and the Court of Appeals interpreted the contract otherwise. In the *Wiloil* case it was held that the seller "was not required by the contract to obtain the fuels at Wilmington but was free to effect performance by shipping from any place within or without Pennsylvania." In the present case the Court of Appeals has held that the contract called for the delivery in New York of oil stored in New Jersey—"*the product in New Jersey, kept there in tanks was the thing bargained for.*" The petitioner is now asking this Court to review this determination of the Court of Appeals as to the terms of the contract between the parties. The comparison of petitioner's and the Court

of Appeals' statements of the facts set forth at pages 4 and 5 above makes this clear.

It is obvious from this comparison that the petitioner's real quarrel is with the Court of Appeals' determination that the contract between the parties called for the delivery in New York of oil stored in New Jersey and that he is asking this Court to review such determination. Without expressly stating at any place in his petition or brief that this determination is wrong, and in fact without including in his assignments of errors any specific assignment to that effect, petitioner merely ignores the Court of Appeals' findings and frames his own statement of facts.

It is true that petitioner, in an attempt to bring himself within paragraphs 5(a) of Rule 38 of this Court, frames his assignments of errors in terms of "an erroneous interpretation of the *Wiloil* case", but it is the interpretation of the contract, not the interpretation of the *Wiloil* case, which the petitioner is in reality asking this Court to review. In the *Wiloil* case this Court held that the contracts "did not require or necessarily involve transportation across the state boundary" and "as interstate transportation was not required or contemplated it may be deemed as merely incidental." It requires no "interpretation" of the *Wiloil* case to find that a contract for the sale and delivery in New York of oil stored in tanks in New Jersey requires and necessarily involves transportation across the state boundary and that interstate transportation was required and contemplated.

II.

This Court has refused to grant a petition for certiorari in the National Cash Register case, which involved the same constitutional question and a state of facts of much broader application than here involved.

The same ignoring of the Court of Appeals' interpretation of the contract is revealed in petitioner's statement at page 7 of his petition that "these are test cases". Under his interpretation of the contract this might be true. It can hardly be true on the facts as found. Here we have a foreign steamship company purchasing bonded or drawback oil stored out of the state for delivery to its foreign flag vessels while in New York harbor during the brief "turn-around" period between their arrival in port from France and their return thereto. The oil is brought by seller's barges and pumped directly into the vessel's tanks. As the Appellate Division said (R. 296):

> "• • • there was no break in transit. • • • The oil was immediately • • • pumped from the lighters into the bunkers of the ship and thereupon became a part of the ship. The vessels themselves had no taxable situs here. (*Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63; *Ayer & Lord Co.* v. *Kentucky*, 202 *id.* 409; *People ex rel. Astor Trust Co.* v. *State Tax Commission*, 174 App. Div. 320, 324)."

It can hardly be true, as petitioner states, that "large numbers of purchasers and sellers and sums of money running into millions of dollars anually are involved". The decision can be rested upon the narrow state of facts which

is probably duplicated only by the few foreign steamship companies running to the Port of New York and purchasing out-of-state fuel or supplies.

The narrow grounds of the decision are further indicated by the distinctions drawn between this and the case of *Sears Roebuck & Co.* v. *McGoldrick*, 279 N. Y. 184, decided the same day, in which the tax was upheld. The Court of Appeals said in this case "the only distinction upon the facts in this case and those in the *Sears Roebuck & Co.* case rests in the nature of the respondent's business."

Petitioner states at page 15 of his brief that so far as he is aware, "this is the first case presented to this Court in which a purchaser-consumer has complained that a retail sales tax levied upon him imposes an invalid burden on interstate commerce." This statement is correct, so far as respondent is aware, to the extent that it is limited to the complainant being the purchaser. It is not, however, the first case presented to this Court involving the validity of a state sales tax imposed by the purchaser's state. *Matter of National Cash Register Co.* v. *Taylor*, 276 N. Y. 208; certiorari denied 303 U. S. 656, involved the validity of the New York City sales tax as applied to purchases by New York residents of goods shipped from outside the state. The only distinctions between that and the present case are:

(a) In the *National Cash Register* case the purchase orders were accepted outside of New York. This is not important—it is not the place of the making of the contract which determines whether interstate commerce is involved (*Real Silk Hosiery Mills* v. *City of Portland*, 268 U. S. 325) but whether transportation across state lines is the "normal, contemplated and followed course" of dealings. (*Western Union* v. *Foster*, 247 U. S. 105, 113.)

(b) In the present case the oil never came to rest in New York State or became a part of the mass of property in New York State. It was pumped into and became a part of a foreign registered vessel engaged in foreign commerce.

It is interesting to note that the Comptroller in his petition for a writ of certiorari in the *National Cash Register* case made the same plea which he makes in his present brief,—that the Court of Appeals had invalidated a type of tax which has never been invalidated by this Court. There is less reason for granting the writ in the present than there was in that case. The present case is clearly within the principles of the *National Cash Register* case but, because of its special facts, is of much more limited application.

The Comptroller in his petition to the Court of Appeals for reargument, and for amendment of the remittitur in the present case, suggested that it is possible that the denial of certiorari in the *National Cash Register* case was based upon this Court's belief that the case did not present an exclusively federal question. We can find no basis in the record for this possibility. The Court of Appeals based its decision in that case exclusively on Federal constitutional grounds.* The Comptroller's petition for certiorari stated the questions presented as exclusively federal questions. The respondent agreed with the petitioner that only federal questions were involved.

This Court also denied certiorari in another case involving the same Local Law and substantially the same facts as the *National Cash Register* case. *McGoldrick* v. *West Publishing Co.*, 303 U. S. 656 (276 N. Y. 535, *sub nom.*, *Matter of West Publishing Co.* v. *Taylor*).

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* This alone was sufficient to bring the *National Cash Register* case within the jurisdiction of this Court. *Virginia* v. *Imperial Coal Sales Co., Inc.*, 293 U. S. 15.

III.

Petitioner has cited no decision of this Court with which the decision of the Court of Appeals is not in accord.

Petitioner has cited no case decided by this Court with which the decision of the Court of Appeals in this case is not in accord. In *Western Live Stock* v. *Bureau*, 303 U. S. 250, the gross receipts tax imposed upon the advertising receipts of a magazine was held valid on the ground that the receipts were not from interstate commerce except to the extent that "the advertising rates reflect a value attributable to the maintenance of a circulation of the magazine interstate" and as to this factor "the burden on the interstate business is too remote and too attenuated to call for a rigidly logical application of the doctrine that gross receipts from interstate commerce may not be made the measure of a tax." The *Wiloil* case has been discussed above. In *Banker Brothers* v. *Pennsylvania*, 222 U. S. 210, the tax was imposed not upon the sale by the out-of-state manufacturer to the dealer but upon the resale, effected within the state, by the dealer to his customer. *Woodruff* v. *Parham*, 8 Wall. 123, and *Hinson* v. *Lott*, 8 Wall. 148, both involved taxes upon sales by local merchants of goods previously brought into the state.

All of the other cases cited by petitioner on page 16 of his brief are "use" tax cases. Petitioner endeavors to sustain the relevancy of these cases by contending that "use" taxes are not distinguishable from sales taxes. He argues at page 17 of his brief that "the New York City sales tax is, moreover, *identical* in substance with the California

tax * * * sustained in *Felt & Tarrant Mfg. Co.* v. *Gallagher, supra* * * *." The argument is one of desperation and demonstrates petitioner's lack of confidence in his other contentions. This Court has squarely held that a "use" tax is not a tax upon the sale: In *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, involving the Washington use tax statute, which is substantially the same as the California statute, Mr. Justice CARDOZO said (at page 587):

> "Finally, there is argument that the tax now in question, though in form upon the use, was in fact upon the foreign sale, and not upon the use at all, the form being a subterfuge. The supposed basis for that argument is a reading of the statute whereby the use shall not be taxable if the chattel was manufactured by the user or received as a legacy or acquired in any way except through the medium of purchase, and a retail one at that. But the fact that the legislature has chosen to lay a tax upon the use of chattels that have been bought does not make the tax upon the use a tax upon the sale."

The use tax statutes have been upheld, when applied to articles acquired in interstate sales, upon the basis of the very distinction which petitioner now seeks to abolish, to wit,—that although a sales tax would tax the *interstate sale* the use tax statutes impose the tax on the *intrastate use*, a taxable event which does not take place until after interstate commerce has ceased.

Moreover, if petitioner were correct in his contention that the New York City Sales Tax is identical with the California Use Tax, he is completely out of court. The New York City Personal Property tax (Appendix C), which supplements its Sales Tax here involved, has been held to

be a "use" tax. See *Williamsburgh Power Plant Corp.* v. *City of New York*, 255 App. Div. 214; affirmed without opinion, 280 N. Y. Adv. 57 (Memo.).

The Appellate Division held in the case at bar that the oil was not subject to the New York City Personal Property tax, stating at page 240 of 254 App. Div. (R. 297):

> "Finding as we do, that the New Jersey shipments never came to rest and acquired no situs in this State and that the interstate or foreign commerce was uninterrupted and continuous, the Personal Property Tax Law also did not apply. (*Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 582; *Minnesota* v. *Blasius, supra*, p. 10)."

The petitioner took no appeal from this determination and argued in the Court of Appeals only that the oil was subject to the sales tax. He has acquiesced in the lower court's determination that the oil is not subject to a use tax and is bound thereby. If, therefore, the sales tax is, as petitioner contends, a use tax, there remains no question for determination by this Court.

CONCLUSION

The decision of the Court of Appeals was in all respects correct and was based on rules long adhered to by this Court; and the petition should be dismissed.

It would, we believe, be difficult to conceive of a transaction which the Commerce Clause was more designed to protect from state interference than that involved in this case. Oil is imported from Venezuela and stored in tanks in New Jersey. If refined oil, it is imported in bond; if

crude it is imported as drawback oil. It is carried by tank barge from these storage tanks in New Jersey to alongside the respondent's vessels in New York harbor, where it is pumped directly into the vessels' tanks. Because of the brief time the respondent's vessels are in port, the ordering of the oil and the dispatching of the tank barges has to be carefully timed to synchronize with the vessels' arrivals. The barges arrive at the vessels' pier either immediately before or at the same time as the vessels, in order to insure the completion of loading of the oil before the vessels depart again for France (R. 184). It is a distinctly "on the wing" operation. If New York City can tax the sales of fuel oil so in transit from the New Jersey refinery and storage tank to an outbound foreign steamer, what transactions are protected by the Commerce Clause?

Dated: New York, N. Y., May 25, 1939.

Respectfully submitted,

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APPENDIX A.

Laws of New York Provisions of State Enabling Act.

Chapter 873, 1934

Section 1. Notwithstanding any other provision of law to the contrary, any city of the State having a population of one million inhabitants or more acting through its local legislative body, is hereby authorized and empowered until December thirty-first, nineteen hundred thirty-five to adopt and amend local laws imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and make provision for the collection thereof by the chief fiscal officer of any such city. The tax or taxes imposed pursuant to such local laws shall be effective only during the period commencing when this act becomes effective and ending December thirty-first, nineteen hundred thirty-five, or any portion of such period. *A tax imposed hereunder shall have application only within the territorial limits of any such city and shall be in addition to any and all other taxes.* [Italics ours.]

* * *

This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits.

This act shall not authorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city, except when imposed without discrimination as between residents and non-resi-

dents, on account of tangible property actually located or income earned, or trades, businesses or professions carried on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within such city by a non-resident while within such city. A corporation shall not be deemed a non-resident by reason of the fact its principal place of business is not within the city.

APPENDIX B.

Local Laws of the City of New York.

Sales Tax.

For the Year 1934, No. 20 as amended by No. 24.

• • • •

§1. Definitions. When used in this local law:

(a) The word "person" includes an individual, copartnership, society, association, joint stock company, corporation, estate, receiver, trustee or any other person acting in a fiduciary capacity, and any combination of individuals;

(b) The word "vendor" means a person selling property or rendering services upon the receipts from which a tax is imposed under section 2 of this local law;

(c) The word "purchaser" means a person who purchases property or to whom are rendered services, receipts from which are taxable under section 2 of this local law;

• • • •

(e) The word "sale" or "selling" means any transfer of title or possession or both, exchange or barter, license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, and may include the rendering of any service specified in section 2 of this local law;

• • • •

(g) A "retail sale" or "sale at retail" means a sale to a customer, or to any person for any purpose other than for resale in the form of tangible personal property;

• • • •

§ 2. Imposition of tax. During the period commencing on December tenth, nineteen hundred and thirty-four, and ending on December thirty-first, nineteen hundred and thirty-five, there shall be paid a tax of two per centum upon

the amount of the receipts from every sale in the city of New York of;

(a) Tangible personal property sold at retail, except those articles described in schedule "A" below;

• • •

Receipts from sales or services by or to the state or city of New York, and receipts from sales or services by or to semi-public institutions, and *receipts upon which the state of New York and city of New York are by virtue of the provisions of the constitution of the United States or otherwise without power to impose a tax shall not be subject to tax hereunder.* [Italics ours.]

• • •

Where a purchaser has failed to pay and a vender has failed to collect a tax upon a sale or service, as imposed by this local law, *then* in addition to all other rights, obligations and remedies provided, *such tax shall be payable by the purchaser directly to the comptroller* and it shall be the duty of the purchaser to file a return thereof with the comptroller and to pay the tax imposed thereon to the comptroller within fifteen days after such sale was made or service rendered. [Italics ours.]

• • •

The *comptroller* may, wherever he deems it necessary for the proper enforcement of this local law, *provide* by regulation *that the purchaser shall file returns and pay directly to the comptroller the tax herein imposed,* at such times as returns are required to be filed and payment over made by vendors. [Italics ours.]

APPENDIX C.

New York City Personal Property Tax.

For the year 1935, No. 25 of 1934, as amended by No. 13 of 1935.

Sec. 1. Imposition of Tax. During the period commencing on January first, nineteen hundred and thirty-five and ending on December thirty-first, nineteen hundred and thirty-five, there shall be paid by the owner a tax of two per centum upon the value of the following-named *articles of personal property situated or owned within the City of New York.*

* * *

(k) Oil, gas, gasoline and other combustibles.

Sec. 2. Exemptions. No tax, as imposed by Section 1 of this title shall be due or payable in any event upon any of the articles enumerated in the said section 1, and no return need be made thereon pursuant to the provisions of this law if any of the following conditions be demonstrated to the satisfaction of the Comptroller.

* * *

c. That the said article is one *upon the receipt from the sale of which a tax has been paid* pursuant to the provisions of this law or Local Law 20, of 1934, as amended. [The City "Sales Tax"] (Italics ours).

* * *